United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7363

ORIGINAL

To be argued by
SAMUEL N. GREENSPOON

United States Court of Appeals
FOR THE SECOND CIRCUIT

In the Matter of the Application
of
ANTCO SHIPPING COMPANY, LIMITED,
Petitioner-Appellant,
against

SIDERMAR S.p.A.,
Respondent-Appellee.

For an Order and Judgment pursuant to Article 75, CPLR staying a certain proposed arbitration.

In the Matter of the Arbitration
between
SIDERMAR S.p.A.,
Cross-Petitioner-Appellee,
and

ANTCO SHIPPING COMPANY, LIMITED and
NEW ENGLAND PETROLEUM CORPORATION,
Cross-Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

EATON, VAN WINKLE & GREENSPOON
Attorneys for Appellants Antco Shipping Company, Limited and New England Petroleum Corp.
600 Third Avenue
New York, New York 10016

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Preliminary

Petitioner, Antco Shipping Company, Limited ("Antco") and cross-respondent, New England Petroleum Corporation

("Nepco") appeal from an order of the United States District Court, Southern District of New York (Haight, D.J.) which denied the petition of Antco to stay a proposed arbitration of appellee Sidermar S.p.A. ("Sidermar") and granted Sidermar's cross-petition to compel a consolidated arbitration between Sidermar and Antco, the contracting parties, and also Nepco as the guarantor of Antco's performance under the contract.

Antco and Nepco contended that:

1) The contract to arbitrate was a boycott of Israel and hence null and void as violative of the law and public policy of the United States and of New York;

2) The arbitration clause was not sufficiently broad to cover the tendered issue;* and

3) Nepco did not assume the terms and conditions of the contract and hence as guarantor was not obligated to arbitrate.

The Court below rejected all of such contentions and directed arbitration as aforesaid.

Issues Presented for Review

1. Whether the Court below erred in rejecting as a matter of law, without an evidentiary hearing, the contention that the contract at bar which constituted a boycott of a nation friendly to the United States was null and void as in conflict with the public policy of the United States and of New York?

2. Whether the Court below erred in ruling as matter of law, without an evidentiary hearing, that a guarantor of

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* The issue tendered was alleged repudiation by Antco of the contract.

performance of one party to a contract to arbitrate was required to arbitrate even though such guarantor did not agree to assume the terms and conditions of the contract to arbitrate?

Statement of the Case*

The parties and the contract

Antco is a corporation organized and existing under the laws of the Commonwealth of the Bahamas and is engaged solely in the shipping business (11a). Nepco is a corporation organized and existing under the laws of the State of New York (38a).

Sidermar is a corporation organized and existing under the laws of the Republic of Italy (11a, 38a) and is engaged in the shipping business as an owner and charterer of ships (11a).

The contract at bar is between Sidermar and Antco (17a, 24a). The contract was negotiated in New York and was executed by Antco in New York (12a).

Under date of October 22, 1973 (23a, 30a), Sidermar, as owner, and Antco, as charterer, entered into a contract of affreightment (Part A and Part B) dated as of February 13, 1973 (17a, 24a). Part A was for a period of one year commencing between August 1 and October 31, 1973 and covered 500,000 tons of shipping, 10% more or less at owner's option (17a). Part B was for a period of five years commencing between April and July 1974 and covered 1,100,000 tons of shipping per year, 10% more or less at owner's option per year (24a). Part A and Part B are identical except for term and quantity of shipping.

The proposed cargo westbound was crude oil or dirty petroleum products (17a). The proposed cargo west

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* Figures in parentheses refers to pages of printed appendix unless otherwise noted.

bound could not be lifted in Israel and the contract expressly boycotted Israel as follows (17a):

> "Loading One (1) or two (2) safe port(s) Mediterranean Sea, excluding Israel, or in case of necessity, at Charterer's option, (1) one or two (2) safe port(s) Nigeria."

The proposed cargo west bound could be discharged only as follows (18a):

> "Discharging One (1) or two (2) safe port(s) Bahamas or other Caribbean port(s) excluding Cuba or at Charterer's option one (1) or two (2) safe port(s) United States Atlantic Coast."

Obviously the owner would not have its vessels sail in ballast from the United States or Caribbean to the Mediterranean. Accordingly, the contract provided (19a):

> "Owners shall supply Charterers forty-five (45) days prior to each quarterly period, a tentative schedule of lifting dates and quantities for that period. It is understood that Owners intention is to perform this contract with combined carriers which will load dry cargoes for their own account as back-haul voyage to Mediterranean. The dry cargo trade could involve delays at loading and discharging ports as well as lack of cargoes and same would compel Owners to divert the ships to other loading ports. For all the above considerations Owners deem it would be very difficult to give Charterers exact scheduling. They can only undertake to keep Charterers continuously posted of vessel's position."

The underlying purpose of the contract was that the ships would transport from the United States or other countries certain dry cargo to various Mediterranean ports

for the account of Sidermar or someone other than Antco; and that the ships would then be loaded for the return voyage from the Mediterranean for the account of Antco or for the account of some firm or person designated by Antco (12a).

Under no circumstance would the vessels load or unload cargo at Israel, no matter the country of origin of that cargo. The purpose of the boycott provision is obvious (32a-33a):

> "It is common knowledge of which the Court can take judicial notice that the Arab countries have organized a boycott of Israel; and that such boycott is implemented in part by refusal to deal with companies and firms which do business with Israel; and also by boycotting United States and other firms which are owned or controlled, in whole or in part by persons of the Jewish faith. Firms dealing with Israel or owned or controlled in whole or in part by persons of the Jewish faith are subjected to Arab blacklists and otherwise discriminated against by Arab countries.
>
> "In order to avoid such blacklist many companies insert provisions in their contracts such as is contained in the contract at bar."

The Court below assumed the truth of the foregoing, saying, however, that Sidermar's thesis that Israel was excluded because it was not safe in view of the political and military tensions at the time was sufficiently plausible to create a reasonable dispute on the issue, which would require an evidentiary hearing to resolve (64a-65a).

The New York contacts

As earlier stated, the contract was negotiated in New York and signed by Antco in New York (12a). In addition the contract expressly provided that all invoices issued by

Sidermar are to be forwarded to Antco c/o Tank Ship Agency, Inc., 201 East 50th Street, New York, N.Y. 10022 (23a, 30a).

The contract further provided for the arbitration of certain disputes in New York. Thus, the contract provided that the provisions of Part II of the Essovoy (1969) form of charter were incorporated into the contract by reference "and shall apply to each voyage"; but if there should be any conflict between the contract and the Essovoy (1969) form, the contract should govern (23a).

And finally the contract provided that if arbitration becomes necessary under Clause 24 of the Essovoy (1969) form, such arbitration shall be held in New York, New York (23a).

Thus, the contract has substantial connection with the State of New York, even aside from the fact that it was negotiated here.

The guarantee

Under date of November 1, 1973, presumably after the contract had been signed (23a, 30a), Nepco executed and delivered to Sidermar a guarantee of the contract of affreightment. The guarantee reads in its entirety as follows (46a):

> "In the event that Antco Shipping Company Ltd. ('Antco'), a Bahamian corporation, fails to perform its duties and obligations as Charterers under the Contract of Affreightment (Part 'A' and Part 'B') dated February 13, 1973 between Sidermar S.P.A. as owners and Antco as Charterers, then New England Petroleum Corporation hereby guarantees to fulfill and perform any and all legal obligations that Antco may be liable for as Charterers under said Contract of Affreightment."

To be noted, is the fact that there is no assumption by Nepco of the terms and conditions of the contract, much less of the Essovoy (1969) charter. Indeed, the guarantee refers solely to the contract of affreightment Part A and Part B and provides that Nepco guaranteed to fulfill and perform any and all legal obligations that Antco may be liable for as Charterer under the contract of affreightment. We submit that in the absence of an assumption of the terms and conditions of the contract and of the Essovoy (1969) charter, Nepco cannot be compelled to arbitrate (46a).

The course of proceedings

Under date of April 19, 1976, Sidermar, through its New York attorneys, served by registered mail upon Antco a demand for arbitration (11a, 14a-15a). In that demand for arbitration Sidermar, through its attorneys, stated that it had appointed as its arbitrator, Mr. Hunt (14a). The demand further pointed out that under the arbitration clause of the contract Antco must appoint its arbitrator within twenty days of the service of the demand (15a).

Antco promptly and under date of May 7, 1976 brought on a special proceeding in the Supreme Court of the State of New York, County of New York for an order staying the proposed arbitration; the Supreme Court granted a stay of arbitration pending the hearing on the petition (9a-10a).

Sidermar under date of May 11, 1976 removed the special proceeding to the United States District Court for the Southern District of New York (4a-5a).

Under date of May 27, 1976 Sidermar served notice of cross-motion and cross-petition to compel a consolidated arbitration between Sidermar on the one hand and Antco and Nepco on the other hand (36a-37a).

The matter came on to be heard before District Judge Haight. The Court below heard oral argument but took

no evidence other than that which is set forth in the papers submitted to the Court (79a).

Under date of June 28, 1976, the Court below rendered its opinion denying Antco's petition to stay arbitration and granting Sidermar's cross-petition to compel a consolidated arbitration with Antco and Nepco and also signed an order carrying into effect the opinion of the Court below (78a, 79a-81a).

The statutes involved

The various statutes and regulations involved herein are set forth in the addendum to this brief.

The decision below

The Court below ruled that even though it assumed the truth of Antco's position with respect to the purpose for including the boycott provision, nonetheless the excluding Israel provision did not offend the public policy of the United States as declared in the Export Administration Act of 1969 and its accompanying regulations (65a). The Court said (65a):

> "That is because the Sidermar/Antco contract of affreightment does not involve, in any meaningful sense, United States exporters, or exports from the United States. This is a contract between an Italian shipowner and a Bahamian charterer for the ocean carriage of cargoes from Mediterranean ports to Caribbean or, at Antco's option, American ports, in which event the contract would give rise to imports, not exports, in respect of the United States."

We suggest that the Court below unduly limited the force of the Congressional declaration of policy as set forth in Section 3(5) of the Export Administration Act of 1969, 50 U.S.C. App. § 2402(5) and the regulations promulgated thereunder. The policy of the United States as

We suggest further that the Court below construed the public policy and the regulatory implementations so narrowly as to virtually deprive them of any effect at all. The public policy inhere or implicit in the arbitration acts must fall before the specific public policy of the United States against boycotts as expressed by Congress and the implementary regulations.

We believe that the Court below was led into error by its reliance on the wrong part of Section 4(b)(1) of the Act, 50 U.S.C. App. § 2403(b)(1) (61a). That provision as quoted and relied on by the Court below (61a) authorizes the President in his discretion to prohibit or curtail exports from the United States except under such rules or regulations as the President may prescribe.

But the provision relied on by the Court below is not the controlling provision here. We are here dealing with Section 3(5) of the Act, 50 U.S.C. App. 2402(5). And Congress imposed upon the President the mandatory (not permissive) duty to implement Section 3(5) of the Act (Section 4(b)(1) of the Act, 50 U.S.C. App. § 2403(b)(1)), as follows:

> "The rules and regulations shall implement the provisions of section 3(5) of this Act [section 2402(5) of this Appendix] . . ."

The Court correctly said that whether or not Nepco as guarantor must participate in the arbitration turns upon the proper construction of the Nepco guarantee (74a). The Court below relying upon this Court's opinion in *Compania Espanola de Petroleos, S. A.* v. *Nereus Shipping S.A.*, 527 F. 2d 966 (2 Cir. 1975), cert. den. —— U.S. ——, 49 L. Ed. 2d 387 (1976), ruled that Nepco was obligated to arbitrate under its said guarantee. The Court below overlooked the essential difference between the guarantee in the *Nereus* case and the guarantee at bar. In the *Nereus* case there was an express assumption by the guarantor of all of the terms and conditions of the

underlying contract. There is no such express assumption here. Accordingly, we submit that this case is controlled by *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.*, 172 F. Supp. 721 (S.D.N.Y. 1959), rather than *Nereus* because of the absence of an assumption clause in the guarantee.

I

The contract at bar is null and void as a boycott of Israel.

A. The Convention of 1958 (9 U.S.C. Secs. 201 *et seq.*) provides that a contract to arbitrate shall not be enforced if the Court finds that it is:

> "null and void, inoperative or incapable of being performed" (Art. II (3) of the Convention).

Obviously, this language must be given some meaning and its meaning must be determined under the law of the jurisdiction of the sitting Court. Certainly, that must be true here since the contract was negotiated in New York, signed in New York by one of the parties, and has substantial references to New York therein.

Any agreement which violates the public policy of the United States may not be enforced by the Courts of the United States, and that public policy is to be gleaned from Acts of Congress, such as the Export Administration Act of 1969 and the regulations promulgated pursuant thereto. Thus, in *Hurd* v. *Hodge*, 334 U.S. 24, 34-5 (1948), the Supreme Court said:

> "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. *Where the enforcement of private agreements*

> *would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.*" (Emphasis supplied.)

But enforcement of the contract is precisely what Sidermar is asking the Courts to do. Sidermar's application to compel arbitration is in effect an application for specific performance of an executory contract and the Courts are being asked to lend their aid to compel specific performance thereof. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 986 (2 Cir. 1942); *Necchi* v. *Necchi Sewing Machine Sales Corp.*, 348 F. 2d 693, 696 (2 Cir. 1965) cert. den. 383 U.S. 909 (1966).

And thus, as the Supreme Court pointed out in *Hurd supra*, 334 U.S. 24, when a Court is being asked to lend its aid to a party to a private contract, the Court may not do so if the contract offends public policy of the United States. And the Convention, 9 U.S.C. Secs. 201 *et seq.* expressly recognizes the doctrine laid down in the *Hurd* case by authorizing the Court to inquire into whether or not the contract is null and void, inoperative or incapable of being performed. Necessarily when the Courts of the United States are being requested to act under the Convention, the Courts of the United States must apply the law of this nation and not the law of some foreign country. See e.g. *California Prune & Apricot Growers Assn.* v. *Catz American Co.*, 60 F. 2d 788, 792 (9 Cir. 1932); *United States* v. *Capps*, 204 F. 2d 655, 660 (4 Cir. 1953) affd. o.g. 348 U.S. 296 (1955).

B. We now turn to the Export Administration Act of 1969 and the regulations promulgated thereunder. Congress expressly declared the public policy of the United States (50 U.S.C. App. § 2402(5), as follows:

> "It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States . . ."

Congress further declared that it was the public policy of the United States (50 U.S.C. App. § 2402(5):—

> "C. to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies."

Pursuant to the authority vested in him, the Secretary of Commerce issued regulations implementing the policy declared by Congress. These regulations* (Part 369 of the Export Administration Regulations) read in part as follows (15 C.F.R. Part 369):—

> "§ 369.1
>
> GENERAL POLICY
>
> "Section 3(5) of the Export Administration Act of 1969, as amended, declares that it is the policy of the United States 'to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States.'
>
> DISCRIMATION ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN
>
> "(a) *Prohibition of Compliance with Requests*
> All exporters and related service organizations (including, but not limited to, banks, insurers, freight forwarders, and shipping companies) engaged or involved in the export or negotiations leading towards the export from the United States of commodities, services, or information, including technical data (whether directly or through distributors, dealers, or agents), are prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice fostered or imposed by foreign countries against other countries friendly

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* These regulations became effective on December 1, 1975.

> to the United States, which practice discriminates, or has the effect of discriminating, against U.S. citizens or firms on the basis of race, color, religion, sex or national origin."

We submit that the boycott provision of the contract at bar expressly violates both the Export Administration Act and the regulations promulgated thereunder. This boycott provision expressly provides that the loading of cargo may take place at one or two safe Mediterranean ports, "excluding Israel" (17a). The obvious purpose of the boycott provision is to curry favor with the Arab countries and to foster and promote their boycott of Israel, a country friendly to the United States. As stated in the moving papers (32a-33a):

> "It is common knowledge of which the Court can take judicial notice that the Arab countries have organized a boycott of Israel; and that such boycott is implemented in part by refusal to deal with companies and firms which do business with Israel; and also by boycotting United States and other firms which are owned or controlled, in whole or in part by persons of the Jewish faith. Firms dealing with Israel or owned or controlled in whole or in part by persons of the Jewish faith are subjected to Arab blacklists and otherwise discriminated against by Arab countries.
>
> "In order to avoid such blacklist many companies insert provisions in their contracts such as is contained in the contract at bar."

Inasmuch as it is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and to foster international cooperation and development of international rules and institutions to insure reasonable access to world supplies,

one branch of the United States government should not set at naught this public policy. The Courts should not permit themselves to be used to foster a boycott imposed by foreign countries against other countries friendly to the United States nor should the Courts uphold contracts which bar any friendly country from reasonable access to world supplies. Yet that is precisely what Sidermar is asking the Courts of the United States to do.

If the Courts of the United States leave the parties without Court enforced remedy, then the Courts are opposing restrictive trade practices and boycotts imposed by foreign countries upon countries friendly to the United States. It is only by staying its hand and not rendering any aid to Sidermar that the Courts can uphold the policy of the United States.

The policy expressed by Congress in the Export Administration Act of 1969 is not the type of an ephemeral policy which this Court considered in *Parsons & Whittemore Overseas Co., Inc.* v. *Société Generale de L'Industrie du Papier (Rakta)*, 508 F. 2d 969 (2 Cir. 1974). We submit that the reliance by the Court below on *Parsons* was misplaced.

Parsons agreed with Rakta to construct, start up and for one year, manage and supervise a paper board mill in Egypt. AID, an agency of the United States Department of State, financed the project. The contract included an arbitration clause and also a force majeure clause which excused delay in performance due to causes beyond Parsons' reasonable capacity to control. Work continued until May 1967 when with the Arab-Israeli war looming and by reason of recurrent expressions of Egyptian hostility to Americans, the majority of Parsons' work crew left Egypt. On June 6, 1976 the Egyptian government broke diplomatic ties with the United States and ordered Americans expelled from Egypt except those who would apply and qualify for a special visa.

Parsons notified Rakta that postponement of the venture was excused by the force majeure clause. Rakta disagreed and demanded damages for breach of contract. Parsons responded by calling into play the arbitration clause of the contract and submitted the dispute directly to a three-man arbitral board governed by the rules of the International Chamber of Commerce. The arbitral board recognized Parsons force majeure defense as good for a short period of time and awarded Rakta damages for the period of time that the force majeure defense was inapplicable.

Under the Convention, the Court may refuse to enforce an arbitral award if enforcement of the award would be contrary to the public policy of the forum country. Parsons argued that various actions by United States officials subsequent to the severance of American-Egyptian diplomatic relations, including AID's withdrawal of financial support for the project, required Parsons as a loyal American citizen to abandon the project. Parsons thus argued that an award predicated on the possibility of Parsons returning to work in defiance of these expressions of national policy would therefore contravene United States public policy and hence the award should not be enforced.

Of course there is a vast difference between enforcing an arbitral award which resulted from action instituted by the party opposing the award and enforcing an executory contract. In the *Parsons* case it was Parsons which had invoked the jurisdiction of the arbitral board and then sought to set at naught an adverse award based upon expressions and action of United States Government officials. At bar, the Court is being asked to enforce an executory contract and thus put itself in opposition to an expressed congressional public policy.

It is true that this Court ruled in *Parsons* that the public policy defense set forth in the Convention should be con-

strued narrowly and that enforcement of foreign arbitral award may be denied on the basis of public policy only where enforcement would violate the forum state's most basic notions of morality and justice (p. 974 of 508 F. 2d). But here, Congress and not government officials have declared the public policy of the United States. Presumably, Congress felt that this nation's basic notions of morality and justice mandated its declaration of this country's public policy. The Courts should not place themselves in opposition to this flat and untrammeled declaration of the public policy of the United States. It is Congress, as the Supreme Court has indicated, which declares this nation's public policy and not the Courts. *Hurd* v. *Hodge*, 334 U.S. 24, 34-5 (1948).

There is not involved here a parochial device protective of national political interests which came into existence because of the sudden split between Egypt and the United States as this Court ruled was the case in *Parsons* (p. 974 of 508 F. 2d). What is present here is a settled, declared public policy and as indicated in *Hurd*, *supra*, it then becomes the obligation of the Courts to refrain from exertions of judicial power which would in any wise collide with that public policy.

Moreover, at the time when Sidermar sought enforcement in the Courts, the Secretary of Commerce had laid down regulations prohibiting contracts of the type involved herein. The Court below simply misconstrued these regulations when it held that they related solely to control of exports from the United States (66a). To the contrary, the regulations relate not to exports as such but to exporters and related service organizations, including shipping companies, which are engaged or involved in the export or negotiations leading towards the export from the United States of commodities, services or information. 15 C.F.R. Part 369, Sec. 369.1(a). Thus Section 369.1(a) bars all shipping companies engaged or involved in the export or negotiations leading toward the export from the

United States of commodities, services, or information, from signing any agreements that have the effect of supporting a restrictive trade practice fostered or imposed by foreign countries against other countries friendly to the United States, if the practice discriminates or has the effect of discrimination against United States persons or firms on the basis of race, color, religion, or national origin.

Indisputably, both Anteo and Sidermar are shipping companies engaged or involved in the export or negotiations leading towards the export from the United States of commodities. Indeed, the contract itself makes it crystal clear that Sidermar is engaged as a shipping company in export ing commodities from the United States (19a). It is thus subject expressly to Section 369.1(a) of the Export Administration Regulations. The contract at bar definitely has the effect of supporting a boycott and a restrictive trade practice fostered or imposed by Arab countries against Israel, a country friendly to the United States, and there can be no doubt that this particular restrictive trade practice has the effect of discriminating against United States citizens or firms on the basis of race, religion or national origin.

We submit that the express declaration of Congress and the implementary regulations bar the Courts from in any way aiding Sidermar in the enforcement of this contract. To do so would pit the Courts against the Congress and the Export Administration Act of 1969 and its implementary regulations. Under such circumstances the Courts should refrain from exertions of their judicial powers.

C. The public policy of the State of New York also stands athwart enforcement of this contract. Effective January 1, 1976, prior to the time when Sidermar sought Court aid, Section 296 of the New York Executive Law was amended by adding subdivision 13 thereto which reads as follows:

> "13. It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott or

blacklist, or to refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person wilfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

"(a) Boycotts connected with labor disputes; or

"(b) Boycotts to protest unlawful discriminatory practices."

Here there is a boycott and refusal to trade with an entire nation and millions of persons because of race, creed or national origin. Indisputably, the contract falls squarely within Section 296.13(i).

The boycott was agreed to in New York, and billings on account of this boycott contract are to be made to New York and payments are to be made from New York. Thus the statute bears down upon this contract with all its rigor and makes performance thereof illegal and unlawful.

Sidermar seemed to argue below that unless there has been enforcement of the boycott under the contract there is no boycott. But that is like saying that a contract to rig prices does not violate the anti-trust laws until someone is hurt thereby. That simply is not and cannot be the law.

Sidermar further argued below that Section 298-a of the Executive Law is unconstitutional. This is beside the mark. In the first place the contract of boycott falls under Section 296.13 and it is thus irrelevant whether or not Section 298-a is constitutional.

New York's prohibition against doing business in New York by a foreign corporation which violates Section 298-a outside of New York does not discriminate between

domestic and foreign corporations and in any event is not necessarily an unreasonable burden on commerce. Indeed, in *Horn Silver Mining Co.* v. *New York*, 143 U.S. 305 (1892), relied on by Sidermar in the Court below the Supreme Court said (p. 314):

> "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

And in any event that penalty of exclusion can be construed consistently with the Congressional power over commerce. See e.g. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949); cf. *Allenberg Cotton Co., Inc.* v. *Pittman*, 419 U.S. 20 (1974). And as stated in *Varsity House, Inc.* v. *Varsity House, Inc.*, 377 F. Supp. 1386, 1388 (E.D.N.Y. 1974):

> "The interstate commerce aspect of defendant's operation does not prevent the enforcement against it of non-discriminatory state laws," citing *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945) and *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973).

Sidermar also argued below that there had been federal preemption by the Export Administration Act. There is here no statement by Congress that it intends to preempt the law; there is nothing inconsistent between New

York law and the federal policy. Indeed New York law complements the federal law. As such there is no preemption and both statutes may constitutionally exist and be enforced.

In *De Canas* v. *Bica*, —— U.S. ——, 47 L. Ed. 2d 43 (1976), the lower courts held unconstitutional a California statute as encroaching upon a comprehensive scheme of the Immigation and Nationality Act (8 U.S.C. §§ 1101 et seq.). Power to regulate immigration is of course vested exclusively in Congress. The Supreme Court reversed the lower courts and sustained the California statute saying (p. 49 of 47 L. Ed. 2d):

> "'federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'
>
> "In this case, we cannot conclude that preemption is required either because 'the nature of the subject matter [regulation of employment of illegal aliens] permits no other conclusion,' or because 'Congress has unmistakably so ordained' that result."

It thus follows that Section 298-a is constitutional. In any event Section 296.13(i) squarely applies and no contention is made that it is unconstitutional.

D. The Secretary of Commerce's regulations referred to above became effective on December 1, 1975 and the New York statute referred to above became effective January 1, 1976; and the contract was executed prior to either of those dates. But it is the public policy in effect on the date when Court enforcement is sought that is relevant and not the public policy in effect on the date when the contract is made. Moreover, the Congressional declaration of policy set forth in the Export Administration

Act of 1969 was in effect on the date when the contract was made.

In this connection the contract provision boycotting Israel was drafted by or on behalf of Sidermar; it was Sidermar which imposed this boycott provision upon Antco and not the other way around (13a).

Moreover, the contract at bar is a continuing contract and Sidermar is seeking enforcement of an executory contract subsequent to the dates when the implementary regulations and the New York statute became effective. As the Supreme Court of the United States ruled in *United States* v. *Freight Assn.*, 166 U.S. 290, 342 (1897):

> "It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect: that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act."

See also to the same effect: *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 108 (1909); *Boroup* v. *Western Operating Corporation*, 130 F. 2d 381, 385 (2 Cir. 1942) cert. den. 317 U.S. 672 (1942).

Indeed, *Matter of Kramer & Uchitelle*, 288 N.Y. 467 (1942), expressly holds that it is the public policy at the time when the remedy is sought which must be considered

and not the public policy at the time the contract was entered into. In that case the Court of Appeals said (pp. 471-2):

> "Arbitration clauses in contracts such as those under consideration are directed solely to the remedy—not to the validity or existence of the contract itself. Thus proceedings to enforce arbitration under article 84 of the Civil Practice Act presuppose the existence of a valid and enforceable contract at the time the remedy is sought. (*Matter of Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N.Y. 261, 271; *Mulji* v. *Cheong Yue Steamship Co., Ltd.* [1926] A.C. 497.)"
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> "As of the precise time when the remedy was invoked, it was to be determined whether public policy prohibited enforcement of the contracts according to their terms."

Matter of Kramer & Uchitelle, supra, 288 N.Y. 467 was followed in *Long Island Structural Steel Co.* v. *Schiavone-Bonomo Corp.*, 53 F. Supp. 505, 506 (S.D.N.Y. 1943) affd. 142 F. 2d 557 (2 Cir. 1944).

In *California Prune & Apricot Growers Assn.* v. *Catz. American Co.*, 60 F. 2d 788 (9 Cir. 1932) the Court of Appeals quoted with approval from *Berkovitz* v. *Arbib & Houlberg*, 230 N.Y. 261 (1921) as follows (p. 792 of 60 F. 2d):

> "'A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought."

Accordingly, we submit that it is the public policy of the United States and of New York at the time Sedermar sought relief which is controlling and not the public policy which existed at the time the contract was executed.

In any event, at the time the contract was executed, the public policy of the United States had already been laid down in the Export Administration Act of 1969. The public policy at that time expressly declared by Congress was that there should be no boycott of a nation friendly to the United States. This public policy it is true was subsequently implemented by the regulations dated December 1, 1975. But the public policy existed just as surely in 1973 as it did in 1975, and hence whether or not the Court will apply the contract date or the date the remedy was sought, public policy still vitiates the contract.

Again, we repeat that this is a continuing executory contract. For the Court to enforce it at any point in time by ordering arbitration pits the Court against the public policy of the United States and this the Supreme Court has said the Courts will not do. *Hurd* v. *Hodge*, 334 U.S. 24.34-5 (1948).

E. The cases relied upon by the Court below are not controlling or are not in point. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) involved a contract between an American company and a German citizen and provided for arbitration of disputes in Paris. The contract was made in Vienna, Austria and provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods; Scherk expressly warranted title to the trademarks and other matters. Closing under the contract took place in Europe.

About a year after the closing, Alberto-Culver discovered that the trademark rights purchased under the contract were subject to encumbrances that threatened to give others superior rights to the trademarks and to restrict or preclude Alberto-Culver's use of them. Alberto-Culver thereupon sought to rescind and tendered back to Scherk the property that had been transferred to Alberto-Culver.

Scherk rejected the rescission and Alberto-Culver then commenced suit in the United States District Court contending that Scherk's fraudulent representations concerning the trademarks violated Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Scherk moved to dismiss the action for want of personal and subject matter jurisdiction and forum non-conveniens and in the alternative to stay the action pending arbitration in Paris pursuant to the agreement of the parties.

The issue before the Court arose under 9 U.S.C. Sec. 2, which provides in effect that an arbitration agreement shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. Presumably, the Court ruled that the contentions advanced by Alberto-Culver were not such grounds as exist at law or in equity for the revocation of any contract. The Supreme Court distinguished *Wilko* v. *Swan*, 346 U.S. 427 (1953), because *Wilko* v. *Swan* arose under the Securities Act of 1933 which provided that any stipulation binding any person acquiring any security to waive compliance with any provision of the Act or the regulations of the Commission would be void. The Supreme Court in *Wilko* v. *Swan*, *supra*, had given effect to that public policy laid down by Congress in refusing to permit arbitration of a claim arising under the Securities Act of 1933. The Supreme Court could not find any comparable provision in the Securities Exchange Act of 1934 relating to Section 10b and hence there was no basis for rejecting arbitration in the *Scherk* case.

On the other hand, at bar, there is an express public policy mandated by Congress that there shall be no boycotts or refusals to deal with respect to countries which are friendly to the United States. We submit that this case is thus like *Wilko* v. *Swan* and that the express public policy of the Export Administration Act and the regulations promulgated thereunder take precedence over any

policy inherent or implicit in the Convention or in the arbitration acts, 9 U.S.C. Secs. 1 et seq.

Island Territory of Curacao v. *Solitron Devices, Inc.*, 489 F. 2d 1313 (2 Cir. 1973) cert. den. 416 U.S. 986 (1974) is also not in point. In that case the District Court granted a petition by Island Territory of Curacao to confirm an arbitration award made in its favor and to enforce a judgment entered thereon in the Courts of Curacao. Apparently Solitron Devices contended that the contract upon which the award had been made had been induced by fraud generally, but no claim was made that the arbitration clause had been induced by fraud. This Court held that the Convention and the federal law implementing the same did not preempt New York State law and that under New York State law the policy of recognizing foreign judgments prevails since there was no conflicting federal regulatory scheme. In that case there was no assertion that the public policy of New York or of the United States had been violated by the contract; to the contrary, as this Court expressly pointed out the defense of frustration was one asserted purely as common law contractual defense (p. 1320 of 489 F. 2d). *Island Territory* is clearly not in point.

The loading provisions of the contract, excluding Israel as a loading port, were as much the essence of the contract as any of its other provisions; since this boycott provision was inserted by Sidermar, it seems clear that Sidermar would not have executed the contract without the boycott provision. As such there can be no excision of the boycott provision from the contract and enforcement of its balance, and hence performance of the contract is now illegal and violative of public policy. The Court's ruling below that performance under the contract was not forbidden by the Export Administration Act and its implementary regulations seems contrary to settled law. See e.g. *Lewis* v. *Jackson & Squire*, 86 F. Supp. 354, 361 (D. Ark. 1949), app. dis. 181 F. 2d 1011 (8 Cir. 1950); *Matter of Kramer*

& Uchitelle, 288 N.Y. 467 (1942) and cases cited at pp. 471-2; cf. *Long Island Structural Steel Co.* v. *Schiavone-Bonomo Corp.*, 53 F. Supp. 505 (S.D.N.Y. 1943) affd. 142 F. 2d 557 (2 Cir. 1944); *United States* v. *Freight Assn.*, 166 U.S. 290, 342 (1897).

We respectfully submit that this contract cannot be truncated; that the Israeli boycott is a material element thereof; and that the Export Administration Act and its implementary regulations mandate that the Courts give no aid or comfort to Sidermar by enforcing the contract.

II

Nepco never agreed to arbitrate with Sidermar.

Nepco did not agree to assume the terms and conditions of the contract or of the Essovoy (1969) form annexed thereto. All that Nepco agreed was to guarantee "to fulfill and perform any and all legal obligations that Anteo may be liable for as Charterers under said Contract of Affreightment" (46a). That failure to agree to assume the terms and conditions of the Contract is an essential difference between this case and *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F. 2d 966 (2 Cir. 1975) cert. den. —— U.S. ——, 49 L.Ed.2d 387 (1976) upon which the Court below relied.

Thus, Nepco is not a party to the contract containing the arbitration clause but is a party solely to the guarantee. The arbitration clause is expressly limited to,

> "any and all differences and disputes of whatsoever nature arising out of this charter", (43a)

and any dispute with Nepco does not arise out of "this charter", but out of the guarantee.

In any event the basic test is not what is said in the arbitration clause, but what is said in the guarantee. Unless the guarantee contains an assumption of Anteo's obligations by

Nepco, the latter cannot be compelled to arbitrate. *Compania Espanola de Petroleos S.A. v. Nereus Ship.*, 527 F.2d 966 (2 Cir. 1975), cert. den. —— U.S. ——, 49 L. Ed. 2d 387 (1976) expressly so provides.

Thus in *Compania, supra*, this Court said (p. 973 of 527 F. 2d):

> "The determination of whether a guarantor is bound by an arbitration clause contained in the original contract necessarily turns on the language chosen by the parties in the guaranty."

Accordingly, we turn to the language of the guarantee dated November 1, 1973 (46a) which reads in its entirety as follows:

> "In the event that Antco Shipping Company Ltd. ('Antco'), a Bahamian corporation, fails to perform its duties and obligations as Charterers, under the Contract of Affreightment (Part 'A' and Part 'B') dated February 13, 1973 between Sidermar S.p.A. as owners and Antco as Charterers, then New England Petroleum Corporation hereby guarantees to fulfill and perform any and all legal obligations that Antco may be liable for as Charterers under said Contract of Affreightment."

This is a mere guarantee of performance of all legal obligations that Antco may be liable for as Charterers. It is not an agreement that Nepco will assume the terms and conditions of the Antco-Sidermar contract. That is the essential difference between this case and *Compania, supra*, 527 F. 2d 966.

The guarantee in *Compania* read in pertinent part as follows (pp. 969-70 of 527 F. 2d):

> "we will perform the balance of the contract and *assume the rights and obligations of Hideca on the same terms and conditions as contained in the Charter Party.*" (Emphasis supplied)

The guarantee in *Compania* is of course an assumption of the terms and conditions of the charter party, including the arbitration clause. And that is the crucial distinction between agreeing to arbitrate as in *Compania* and not agreeing to arbitrate as is the case here. This Court expressly pointed out that distinction in *Compania, supra* (pp. 973-4 of 527 F. 2d):

> "The latter [*Taiwan Navigation Co., Ltd.* v. *Seven Seas Merchants Corp.*] involved a guaranty which prescribed merely that the third party would 'guarantee performance' by the charterer. Here, under the guaranty Cepsa agreed both to 'perform the balance of the contract' and to 'assume the rights and obligations of HIDECA.'
>
> Thus, the court's holding in Taiwan that 'performance' could not include the obligation to arbitrate does not dictate our disposition here where additional obligations were expressly undertaken. We agree with Judge Stewart that the duty to arbitrate was indeed one of the rights and obligations under the contract which Cepsa, as guarantor, agreed to assume." [Bracketed material interpolated].

In *Taiwan Navigation Co.* v. *Seven Seas Merchants Corp.*, 172 F. Supp. 721 (S.D.N.Y. 1959), which this Court distinguished but did not overrule, the guarantee was of performance as is the guarantee at bar. The Court held that the guarantor could not be compelled to arbitrate saying (p. 722 of 172 F. Supp):

> "Accordingly, Kervin need not arbitrate on behalf of Seven Seas in fulfillment of its guarantee of the latter's performance."

In sum, Nepco did not agree "to assume the obligations, terms and conditions of the charter." It merely guaranteed performance of Antco's legal liabilities. It accordingly cannot be compelled to arbitrate.

III

Conclusion.

The contract at bar is a boycott of a country friendly to the United States; the boycott is obviously designed to aid and promote the Arab boycott of Israel; this boycott violates the public policy of the United States and the implementary regulations promulgated thereunder by the Secretary of Commerce; the boycott or blacklist also violates the public policy of the State of New York.

The Courts should not pit themselves against this public policy and should enforce this public policy in all of its rigor. Private contracts must yield to this express public policy and the mere fact that it is also public policy to compel arbitration of international arbitration contracts cannot save this contract. To save this contract would frustrate the United States' public policy of free trade and opposition to boycotts which policy is essential to survival of the United States as well as of countries friendly to the United States.

Moreover, this contract violates the public policy of the State of New York which does not conflict with the public policy of the United States and thus should be applied to this New York contract.

It was argued below that the question of illegality and public policy should be decided by the arbitrators and not by the Courts. It may be that that is what the Court below intended in its order when it provided that the arbitration panel shall hear and decide all issues and disputes arising out of the contract between Sidermar and Antco and the guarantee of Nepco (80a). But we submit that the Courts may not, at least in the first instance, leave this delicate task of enforcing United States public policy to the arbitrators. Indeed, we submit that *Hurd* v. *Hodge*, and

the convention itself mandate that the Courts enforce this United States public policy and bar enforcement of the contract.

In any event, we submit that Nepco as guarantor did not assume the terms and conditions of the contract or of the Essovoy (1969) form and hence cannot be compelled to arbitrate. The order appealed from should be reversed, Antco's petition granted, the arbitration stayed, and Sidermar's cross petition to compel consolidated arbitration denied.

Respectfully submitted,

EATON, VAN WINKLE & GREENSPOON
Attorneys for Appellants Antco Shipping Company, Limited and New England Petroleum Corp.
600 Third Avenue
New York, New York 10016

ADDENDUM

Article II, Convention of 1958, 9 U.S.C. Sec. 201.

ARTICLE II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Section 3(5) of the Export Administration Act of 1969, 50 U.S.C. App. § 2402(5) reads as follows:

§ 2402. Congressional declaration of policy

The Congress makes the following declarations:

(5) It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements,

which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States, and (C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

Section 4(b)(1) of the Export Administration Act, 50 U.S.C. App. § 2403(b)(1) reads as follows:

Presidential determinations; rules and regulations; allocation of export licenses; export decontrol, investigation; Presidential removal of unilateral export controls; priority to controls; report to President and Congress

(b)(1) To effectuate the policies set forth in section 3 of this Act [section 2402 of this Appendix], the President may prohibit or curtail the exportation from the United States, its territories and possessions, of any articles, materials, or supplies, including technical data or any other information, except under such rules and regulations as he shall prescribe. To the extent necessary to achieve effective enforcement of this Act [sections 2401 to 2413 of this Appendix], these rules and regulations may apply to the financing, transporting, and other servicing of exports and the participation therein by any person. Rules and regulations may provide for denial of any request or application for authority to export articles, materials, or supplies, including technical data, or any other information, from the United States, its territories and possessions, to any nation or combination of nations threatening the national security of the United States if the President determines that their export would prove detrimental to the national security of the United States, regardless of their availability from nations other than any nation or combination of nations threatening the national security of the United States, but whenever export licenses are re-

quired on the ground that considerations of national security override considerations of foreign availability, the reasons for so doing shall be reported to the Congress in the quarterly report following the decision to require such licenses on that ground to the extent considerations of national security and foreign policy permit. The rules and regulations shall implement the provisions of section 3(5) of this Act [section 2402(5) of this Appendix] and shall require that all domestic concerns receiving requests for the furnishing of information or the signing of agreements as specified in that section must report this fact to the Secretary of Commerce for such action as he may deem appropriate to carry out the purposes of that section. In curtailing the exportation of any articles, materials, or supplies to effectuate the policy set forth in section 3(2)(A) of this Act [section 2402(2)(A) of this Appendix], the President is authorized and directed to allocate a portion of export licenses on the basis of factors other than a prior history of exportation.

Section 369.1 of the Export Administration Regulations, 15 CFR Part 369, reads as follows:

§ 369.1 General policy

Section 3(5) of the Export Administration Act of 1969, as amended, declares that it is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States.

DISCRIMINATION ON THE BASIS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

(a) *Prohibition of Compliance with Requests*

All exporters and related service organizations (including, but not limited to, banks, insurers, freight forwarders, and shipping companies) engaged or involved in the export or negotiations leading towards the export

from the United States of commodities, services, or information, including technical data (whether directly or through distributors, dealers, or agents), are prohibited from taking any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice fostered or imposed by foreign countries against other countries friendly to the United States, which practice discriminates, or has the effect of discriminating, against U.S. citizens or firms on the basis of race, color, religion, sex or national origin.

Subdivision 13 of Section 296 of the New York Executive Law reads as follows:

13. It shall be an unlawful discriminatory practice (i) for any person to discriminate against, boycott or blacklist, or to refuse to buy from, sell to or trade with, any person, because of the race, creed, color, national origin or sex of such person, or of such person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers or customers, or (ii) for any person wilfully to do any act or refrain from doing any act which enables any such person to take such action. This subdivision shall not apply to:

(a) Boycotts connected with labor disputes; or

(b) Boycotts to protest unlawful discriminatory practices.

Section 298-a of the New York Executive Law reads as follows:

§ 298-a. Application of article to certain acts committed outside the state of New York

1. The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation

organized under the laws of this state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state.

2. If a resident person or domestic corporation violates any provision of this article by virtue of the provisions of this section, this article shall apply to such person or corporation in the same manner and to the same extent as such provisions would have applied had such act been committed within this state except that the penal provisions of such article shall not be applicable.

3. If a non-resident person or foreign corporation violates any provision of this article by virtue of the provisions of this section, such person or corporation shall be prohibited from transacting any business within this state. Except as otherwise provided in this subdivision, the provisions of section two hundred ninety-seven of this chapter governing the procedure for determining and processing unlawful discriminatory practices shall apply to violations defined by this subdivision insofar as such provisions are or can be made applicable. If the division of human rights has reason to believe that a non-resident person or foreign corporation has committed or is about to commit outside of this state an act which if committed within this state would constitute an unlawful discriminatory practice and that such act is in violation of any provision of this article by virtue of the provisions of this section, it shall serve a copy of the complaint upon such person or corportaion by personal service either within or without the state or by registered mail, return receipt requested, directed to such person or corporation at his or its last known place of residence or business, together with a notice requiring such person or corporation to appear at a hearing, specifying the time and place thereof, and to show cause why a cease and desist order should not be issued against such person or corporation. If such person

or corporation shall fail to appear at such hearing or does not show sufficient cause why such order should not be issued, the division shall cause to be issued and served upon such person or corportaion an order to cease or desist from the act or acts complained of. Failure to comply with any such order shall be followed by the issuance by the division of an order prohibiting such person or corporation from transacting any business within this state. A person or corporation who or which transacts business in this state in violation of any such order is guilty of a class A misdemeanor. Any order issued pursuant to this subdivision may be vacated by the division upon satisfactory proof of compliance with such order. All orders issued pursuant to this subdivision shall be subject to judicial review in the manner prescribed by article seventy-eight of the civil practice law and rules. Added L.1975, c. 662, § 2.

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